Supreme Court, U.S.
FILED
JUN 10 2004
OFFICE OF THE CLERK

No. 03-1515

In the Supreme Court of the United States

CITY OF MCALESTER, ET AL.,
Petitioners,

v.

PITTSBURG COUNTY RURAL
WATER DISTRICT NO. 7, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

The Tenth Circuit says it upheld the deannexation order, and Pitt-7 is eager to advance the argument in responding to the Petition for Writ of Certiorari. But a careful review of the Tenth Circuit's decision will demonstrate that the deannexation order and the Tenth Circuit's application of Section 1926(b) conflict directly. The Tenth Circuit has removed the effect of the deannexation order; it has allowed a collateral attack that was disallowed by a prior, final order entered by the state appellate court. As a result, preemption has been found, even though the Tenth Circuit and Pitt-7 seek to avoid the label.

Specifically, the Tenth Circuit held that for purposes of Section 1926(b) protection, it will look behind the deannexation order to determine Pitt-7's territorial boundaries at an earlier date. [Appendix B, at p. 21a, *quoted in* Response, at p. 9.] In doing so, the Tenth Circuit has *removed* the effect of the deannexation order. Based on the Tenth Circuit's decision, the deannexation order does not have the full effect contemplated by the Commissioners. The Tenth Circuit reached this result by applying federal law. The result is that state law has been limited by the Tenth Circuit on the basis that it conflicts with federal law. That is the essence of federal preemption, as demonstrated in the Petition for Writ of Certiorari filed in this action.

In an effort to protect the Tenth Circuit's decision from scrutiny, Pitt-7 has engaged in a pattern of blatant misrepresentations. The purpose of this Reply is to outline these misrepresentations so that they will not distract the Court from the critical issues raised by the Petition for Writ of Certiorari.

ARGUMENT AND AUTHORITIES

1. Pitt-7 has attempted to mislead the Court regarding the issues addressed to the state appellate courts in proceedings leading to certain orders and opinions that Pitt-7 has attempted to avoid collaterally.

Pitt-7 has blatantly misrepresented the nature of the state-appellate-court proceedings that are at issue in this litigation. On page 5 of its Response, Pitt-7 asserts that, in state-appellate-court proceedings, "Pitt-7 and the Landowners did not litigate the preclusive effect of the Board of Commissioners' orders pursuant to § 1926(b). Indeed, *any findings or conclusions by the Appellate Courts which held that the deannexation orders are not subject to collateral attack or an equitable challenge, such as declaratory relief, was [sic] beyond the issue on appeal, i.e.*, whether the appeal was timely commenced." [Response, at p. 5 (emphasis added).] This assertion is plainly false.

The record before the Tenth Circuit shows that on or about May 30, 1997, Pitt-7 submitted to the Commissioners a "Motion to Strike Hearing and Abate Further Action" (hereinafter "Motion to Strike"). In the Motion to Strike, Pitt-7 argued that the Commissioners "lack[ed] power to deannex such Territory due to Federal preemption." [Appendix H, at 7a.]

The record before the Tenth Circuit shows that on July 16, 1997, Pitt-7 filed a "Petition in Error Appealing Decision of the Board of Commissioners and/or Petition for Declaratory Relief" (hereinafter "July 16, 1997 Petition in Error"), with the District Court of Pittsburgh County, State of Oklahoma. In the July 16, 1997 Petition in Error, Pitt-7

specifically listed its "issues to be raised on appeal." [Appendix H, at 25a.] Among these issues, Pitt-7 identified the following questions:

1. Did the Board of County Commissioners act beyond their power and authority in granting the deannexation.

2. Is the State statute which empowers the Board of County Commissioners to grant deannexation preempted by Federal Statute.

[Appendix H, at 25a.] Furthermore, in the July 16, 1997 Petition in Error, Pitt-7 attempted to state a separate and additional claim for declaratory judgment. [Appendix H, at 26a through 29a.] Among other things, Pitt-7 sought a declaration "that the Board of County Commissioner's actions of deannexation are void and of no force and effect." [Appendix H, at 29a.] Thus, with its initial appeal from the Commissioners' ruling, Pitt-7 attempted a collateral attack on the deannexation order through declaratory relief.[1] This collateral attack was dismissed by the District Court of Pittsburg County and was later specifically rejected on the merits by the Oklahoma Court of Civil Appeals. [Appendix G, at p. 135a.]

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[1] In a Response filed with the District Court of Pittsburg County on August 19, 1997, Pitt-7 argued that it included the request for declaratory relief in its July 16, 1997 Petition in Error because "[i]f the action of the Commissioners in granting the deannexation is void, Pitt-7 is free to challenge such action by a separate litigation and is not limited to its appeal rights." [Appendix H, at 37a.] Pitt-7 said the same thing in a Response filed with the Oklahoma Court of Civil Appeals on July 9, 1998. [Appendix H, at 48a.]

The record before the Tenth Circuit shows that on September 26, 1997, Pitt-7 filed a "Petition in Error" (hereinafter "September 26, 1997 Petition in Error"), with the Oklahoma Supreme Court. In the September 26, 1997 Petition in Error, Pitt-7 specifically listed its "issues and errors proposed to be raised on appeal." [Appendix H, at 41a.] Among these issues, Pitt-7 identified the following questions:

> 9. *Did the District Court commit error in dismissing Pitt-7's Alternative Declaratory Judgment Action*?
>
> 10. Is the deannexation by the County Commissioners a judicial or legislative act?
>
> 11. Is a decision made by County Commissioners to deannex territory from a rural water district indebted to the Federal Court, null and void as a violation of federal law?
>
> 12. *Is a determination made by the Board of County Commissioners subject to collateral attack as being void*?

[Appendix H, at 42a (emphasis added).] Thus, when it initiated the appeal referenced on page 5 of its Response, Pitt-7 specifically placed before the state appellate court the issues of (1) whether the deannexation order was subject to collateral attack and (2) whether declaratory relief was available to Pitt-7 as a method of collaterally attacking the deannexation order. On July 9, 1998, when it filed a Response to Petition for Rehearing[2] with the Oklahoma Court of Civil Appeals, Pitt-7

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[2] With its Response to Petition for Rehearing, Pitt-7 sought to keep the initial determination by the Oklahoma Court of Civil

argued that "regardless of whether the actions of the Commissioners was [*sic*] legislative or judicial, such actions are void *and subject to collateral attack*." [Appendix H, at p. 52a (emphasis added).] On September 25, 1998, Pitt-7 filed a Corrected Petition for Rehearing and argued that "the declaratory judgment action [that it filed with its July 16, 1997 Petition in Error] should not be dismissed *because the deannexation is subject to collateral attack as being void.*" [Appendix H, at p. 63a (emphasis added).][3]

Pitt-7 filed its Petition for Certiorari with the Oklahoma Supreme Court on October 29, 1998. In that Petition, Pitt-7 argued, as a reason for review, that the Court of Civil Appeals "committed error in dismissing Pitt-7's Declaratory Judgment Action because the decision of the County Commissioners was void, for lack of subject matter jurisdiction due to Federal Preemption." [Appendix H, at 72a.] Thus, Pitt-7 sought further appellate review of the preclusive effect of the deannexation orders and the availability of collateral review.[4]

Appeals that deannexation is a legislative function. The Oklahoma Court of Civil Appeals ultimately granted rehearing and determined that deannexation is a judicial function. [Appendix G, at p. 134a.] As demonstrated infra page 7, the issue of whether deannexation is legislative or judicial was critical to Pitt-7's collateral-attack issue on appeal.

[3] Pitt-7 also continued to assert that Section 1926(b) preempted the deannexation proceedings. [Appendix H, at 66a.]

[4] It is inconceivable that Pitt-7 would conceal the extent of its efforts to obtain appellate review of these issues, and argue to the U.S. Supreme Court that "Pitt-7 and the Landowners did not litigate the preclusive effect of the Board of Commissioners' orders pursuant to § 1926(b)," and that "any findings or conclusions by the Appellate Courts which held that the deannexation orders are not

Indeed, the issue of a collateral attack against the deannexation order was high on Pitt-7's agenda because of its own lawyers' negligence in failing to perfect the first-level appeal from the deannexation orders. Specifically, when it filed July 16, 1997 Petition in Error, Pitt-7 failed to fulfill all of the jurisdictional requirements of an appeal from an order of the county commissioners. [Appendix G, at pp. 135a, 147a.] It was for this reason that Pitt-7 *itself* raised the issues of preemption and the availability of collateral attack.

The answer to Pitt-7's question on the availability of collateral attack depended on whether the deannexation order was legislative or judicial in nature – an issue that Pitt-7 itself placed before the state appellate court with its September 26, 1997 Petition in Error, as noted above. On September 8, 1998, the Oklahoma Court of Civil Appeals held that in adjusting Pitt-7's geographic boundaries, the Commissioners were acting "in a judicial or quasi-judicial capacity." [Appendix G, at p. 134a.] As a result, "the statutory appeal is the exclusive remedy and resort can not be had to an equitable remedy." [Appendix G, at p. 135a.] Because Pitt-7 failed to perfect its appeal from the deannexation order, the order was held to be "final and binding on the water district even if based on an erroneous application of federal law. It is not subject to collateral attack or an equitable challenge, such as declaratory relief." [Appendix G, at p. 135a.] In making this pronouncement, the Oklahoma Court of Civil Appeals answered a question submitted by Pitt-7 itself.

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subject to collateral attack or an equitable challenge, such as declaratory relief, was beyond the issue on appeal, *i.e.*, whether the appeal was timely commenced." [Response, at p. 5.] Such misrepresentations would be sanctionable in any court.

2. In its Response, Pitt-7 misrepresented certain aspects of the Tenth Circuit's decision.

On page 7 of its Response, Pitt-7 asserts that the Tenth Circuit found that the Section 1926(b) issues in this case "were not raised and could not have been raised or decided in the Board of Commissioners proceeding." [Response, at p. 7.][5] This assertion is partly in error. At the outset, Pitt-7 is correct in stating that the Tenth Circuit found that the Board of Commissioners lacked the capacity to decide the Section 1926(b) issues that Pitt-7 itself raised during the deannexation proceedings. Indeed, in its Petition for Writ of Certiorari, McAlester has specifically addressed the plain error in the Tenth Circuit's decision that the Board of Commissioners lacked jurisdiction to decide whether its own contemplated action was preempted by federal law.[6] [Petition, at pp. 12-

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[5] Also on page 7 of the Response, Pitt-7 asserts that "the Tenth Circuit properly held that this question was not presented to and could not have been presented to the Board of Commissioners because it is beyond the Board of Commissioners' limited jurisdiction." [Response, at p. 7.] Again, Pitt-7 is in error. The Tenth Circuit did place limits on the Commissioners' jurisdiction to evaluate the constitutionality of its actions. But the Tenth Circuit did not hold that the question of preemption "was not presented" to the Commissioners. This is another example of Pitt-7's misrepresentations to the Court.

[6] This issue runs to a fairly fundamental tenet in the U.S. constitutional legal system. All governmental actors are charged with evaluating their own governmental conduct to determine whether their actions are constitutional. It seems absurd to hear an argument that a state administrative body – the Pittsburgh County Board of Commissioners – acting in a quasi-judicial capacity lacked the authority to determine the constitutionality of its own contemplated deannexation orders. To be clear, the U.S. Supreme Court holds the ultimate authority to decide constitutional issues.

20.] Pitt-7 is incorrect, however, in stating that the Tenth Circuit found that the Section 1926(b) issues "were not raised . . . in the Board of Commissioners proceeding." [Response, at p. 7.] As demonstrated above in Section 1 of this Reply, Pitt-7 itself raised Section 1926(b) and preemption repeatedly in the deannexation process and subsequent appellate proceedings. Indeed, the Tenth Circuit itself noted that "Pitt-7 moved before the Board to strike the petitions on the grounds that federal law – specifically § 1926 – preempted the requested deannexation." [Appendix B, at p. 8a.]

3. In their effort to keep the litigation payday alive, rural water districts like Pitt-7 have blatantly turned against the plain text of 7 U.S.C. § 1926(b).

On page 3 of its Response, Pitt-7 scoffs at the text of the statute itself. Specifically, on pages 10 and 11 of its Petition, McAlester suggested that "[t]o fall within the prohibition, the limitation or curtailment of water service must be accomplished through 'inclusion of the area served ... within the boundaries of any municipal corporation or other public body, or by the granting of any franchise for similar service

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Marbury v. Madison, 5 U.S. 137 (1803); *Cooper v. Aaron*, 358 U.S. 1, 18 (1958). Constitutional questions decided by lower courts and by other branches of government are subject to judicial review to ensure the consistent application of the Constitution. In this case, the constitutional question – whether Section 1926(b) preempts state-law deannexation proceedings – was decided by a quasi-judicial state administrative body. The method of judicial review was clear and available to Pitt-7. The state appellate court determined that judicial review was exclusive and dispositive. Nothing more needs to be decided. Unfortunately, the Tenth Circuit stepped around these doctrines, effectively removing a component of the judicial authority of state administrative bodies.

within such area during the term of such loan.' 7 U.S.C. § 1926(b)." [Petition, at pp. 10-11.] On page 3 of its Response, Pitt-7 makes note of this argument and states that it "is in error." [Response, at p. 3.] In doing so, Pitt-7 overlooks the fact that this argument by McAlester *quotes the statute itself.* Rural water districts like Pitt-7 have urged the lower courts to expand the statute far beyond its text. Unfortunately, the rural water districts have succeeded in this effort. Now, in a remarkably ironic twist, Pitt-7 has argued – blatantly and expressly – that an argument based on and quoting the statute's own words *is in error*. The rural water districts hope that textual interpretation of statutes is dead. In the same breath, the rural water districts hope that Section 1926(b) litigation – and the attendant extortionate pressure that they are able to impose upon their neighboring municipalities – lives on.

CONCLUSION

In summary, Respondent Pitt-7 specifically litigated the preclusive effect of the Pittsburg County Commisioners' deannexation order. Pitt-7 sought a ruling from the Commissioners on whether the deannexation proceedings were preempted. Then, on the first level of appeal, in addition to the preemption issue, Pitt-7 sought a ruling from the District Court of Pittsburg County on whether the deannexation order could be collaterally attacked. Indeed, Pitt-7 included a collateral attack within its first level of appeal, when it requested from the District Court of Pittsburg County a declaratory judgment that the deannexation order was void. On appeal to the Oklahoma Court of Civil Appeals and the Oklahoma Supreme Court, Pitt-7 consistently raised preemption and the availability of a collateral attack against the deannexation order. The end result of the state-appellate-court proceedings was that Pitt-7's challenges against the

deannexation order were rejected. Pitt-7's claim of federal preemption was rejected. Pitt-7's request for declaratory judgment was dismissed. The Court of Civil Appeals affirmed the dismissal, specifically holding that the deannexation order was not subject to collateral attack, even if based on an erroneous application of federal law. The Tenth Circuit has attempted to side step these circumstances by removing the effect of the deannexation order but avoiding the label of preemption. Specifically, the Tenth Circuit's order allows the deannexation order to exist, but looks to federal law for purposes of determining the geographic boundaries of the rural water district. This approach renders the deannexation order a nullity. The preemptive effect of federal law is undeniable. In its effort to perpetuate the Tenth Circuit's error on this issue, Pitt-7 has attempted to mislead the U.S. Supreme Court regarding the state of the record. The U.S. Supreme Court should grant certiorari in order to undo this error and prevent the inequity that would result from Pitt-7's misconduct.

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APPENDIX H

BEFORE THE BOARD OF COUNTY COMMISSIONERS
OF PITTSBURG COUNTY, OKLAHOMA

IN THE MATTER OF PETITION FOR DEANNEXATION SUBMITTED BY Kenneth W. and Linda F. Sherill **(See Exhibit 1)**[1]

IN THE MATTER OF PETITION TO RELEASE LANDS FROM RURAL WATER DISTRICT NO. 7 PITTSBURG COUNTY, OKLAHOMA, Submitted by Landowners within the Steven W. Taylor Industrial-Park **(See Exhibit 2)**

IN THE MATTER OF PETITION FOR DEANNEXATION Submitted by Pittsburg County Regional Exposition Authority **(See Exhibit 3)**

MOTION TO STRIKE HEARING AND ABATE FURTHER ACTION

COMES NOW Pittsburg County Rural Water District No. 7 ("Pitt-7") and hereby moves and requests the Board of

[1] The Exhibits referenced herein are filed and served as the "Exhibits To Brief In Support of Plaintiff's Motion For Preliminary Injunction" in the United States District Court, E.D. Oklahoma, Case No. CIV-97-185-B and filed with the Board of County Commissioners of Pittsburgh County herewith.

County Commissioners of Pittsburg County, Oklahoma to strike the hearing scheduled for June 16, 1997 in the above referenced matters and to abate further actions on such matters until a proper resolution is had in the pending U.S. District Court action. In support of this Motion Pitt-7 shows the Board as follows:

FACTS

1. Pittsburg County Rural Water District No. 7 ("Pitt-7), is an agency and legally constituted authority of the State of Oklahoma [82 O.S. Section 1324.6; Section 1306 (1970) (replead 1972) - predecessor of 1324.6], created for the purpose of developing and providing an adequate water supply to serve and meet the needs of residents within the territory of the District Title 82 O.S. Section 1324.3).

2. City of McAlester (a municipality) and McAlester Public Works Authority (an Oklahoma public trust created pursuant to 60 O.S. Section 176, et seq.) are located in Pittsburg County, and in part, within the jurisdictional limits of Pitt-7's "Territory". The City and the Public Works Authority are presently Defendants in Federal Civil Action CIV-97-185-B (Eastern District of Oklahoma). (The two Defendants are hereinafter collectively referred to as "McAlester" or "Defendants".)

3. Pitt-7 is duly empowered as a rural water district, to borrow funds from the Federal Government [Okla. Stat. Tit. 82, Section 1324.10 (Supp. 1988)]. In the process of performing its purpose, Pitt-7 has in fact borrowed funds from the Federal Government; and continues to be indebted to the Federal Government pursuant to and in accordance with Title 7 USC § 1926 for such borrowing.

4. Pitt-7 enjoys the protection of 7 United States Code, Section 1926(b), by reason of its indebtedness due the Federal Government [Congress enacted 7 U.S.C. Section 1926(b) as part of a federal statutory scheme to extend loans and grants to certain associations providing soil conservation practices, water service, or management, etc.]

The statute states:

> The service provided or made available through any such association shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of such loan; nor shall the happening of any such event be the basis of requiring such association to secure any franchise, license, or permit as a condition to continuing to serve the area served by the association at the time of the occurrence of such event.

Title 7 U.S.C. Section 1926(b).

5. 7 U.S.C. Section 1926(b) prohibits municipalities' from exercising their powers to sell water, when their exercise would result in competition with a Rural Water District. Water District No. 3 v. Owasso Utility Auth., 530 F.Supp. 818.) The statute [7 U.S.C. Section 1926(b)] protects an indebted rural association from curtailment or limitation by impinging municipal corporations.

6. Pursuant to its creating statutes, Pitt-7 was established to serve a certain geographical area which is hereinafter referenced as the "Pitt-7 Territory".

7. Defendants are and have been selling water within Pitt-7's "Territory" to potential customers of Pitt-7, which Pitt-7 has the ability to provide such service either currently or within a reasonable time.

8. Defendants have been properly warned, in writing, that they impinge, encroach, and are acting in competition with Pitt-7 within the above legally described "Territory". Despite such warnings, the Defendants have, knowingly, continued, in violation of law, to impinge, encroach and act in competition for water service within the "Territory".

9. The unambiguous wording of this statute and its legislative history disclose that the underlying purpose of § 1926(b) is to protect the territory served by such association against competitive facilities which may be developed with the expansion of municipal boundaries:

> "A new provision [section 1926(b) has been added to assist in protecting the territory served by such an association facility against competitive facilities, which might otherwise be developed with the expansion of the boundaries of municipal and other public bodies into an area served by the rural system.

S.Rep. No. 566, 87th Cong., 1st Sess., reprinted in 1961 U.S. Code Cong. & Admin. News 2243, 2309.

10. The Courts, which have addressed §1926(b), have made it clear that the statute should be applied broadly to protect rural water associations indebted to the FmHA from competition from expanding municipal systems, whatever form the competition may take:

> "The clear message Of the three federal cases applying 7 USC § 1926(b) . . . and of the Senate Report is that the statute should not be construed narrowly to prohibit municipal encroachment only if technically by annexation or grant of a franchise, but should be applied broadly to protect rural water associations indebted to the FmHA from competition from expanding municipal systems."

Jennings Water, Inc. v. City of North Vernon, Inc., 682 F.Supp. 421, 425 (S.D. Ind. 1988), affirmed at 895 F.2d 311 (7th Cir. 1989).

11. A municipality is not allowed to encroach upon the services provided by a Rural Water District by any means, including condemnation:

> The statute unambiguously prohibits any curtailment or limitation of an FmHA-indebted water association's services resulting from municipal annexation or inclusion. This language indicates a congressional mandate that local governments not encroach upon the services provided by such associations, be that encroachment in the form of competing franchises, new or additional permit requirements, or similar means. To read a loophole into this absolute prohibition, as Madison would have us do, and allow a city to do via condemnation what it is forbidden by other means, would render nugatory the clear purpose of § 1926(b).

City of Madison, Miss. v. Bear Creek Water Ass'n., Inc., 816 F.2d 1057 (5th Cir. 1987).

12. Purposes of 7 U.S.C. § 1926(b) include protection of the viability and financial security of the Water Association. See Jennings Water v. City of North Vernon, Ind., 895 F.2d 311 (7th Cir. 1989) and Ct of Madison v. Bear Creek Water Association, 816 F.2d 1057 (5th Cir. 1987).

13. On March 25, 1997, Pitt-7 instigated legal action in the United States District Court, Eastern District of Oklahoma, Case No. CIV-97-185-B, seeking to enjoin and prohibit McAlester from selling water to residents within the Pitt-7 Territory. Exhibit 4

14. On or about May 19, 1997, certain of the residents within the Pitt-7 Territory (Kenneth W. Sherill, Linda F. Sherill, City of McAlester, BAR-19, Blessing Corp d/b/a Edison Plastics, MIG, Inc., Southwest Oklahoma Box Company, Tri-Cat, Inc., Simmons Poultry Forms, Inc., Dennis DeFrange, Terry Kinyon and the Pittsburg County Regional Exposition Authority, all filed Petitions with the Pittsburg County Clerk (County Commissioners) seeking to have their lands within the Pitt-7 Territory deannexed from such Territory.

15. It is obvious that the Petitioners have conspired with McAlester in order to, violate and circumvent Pitt-7's 1926(b) rights. Such action is a violation of 42 U.S.C. §1983.

16. This Board has issued orders which set the landowners Petition for deannexation for hearing on June 16, 1997. (Exhibit 5)

17. Pitt-7 has filed its First Amended Petition in the U.S. District Court Case, adding as additional parties thereto the Petitioners herein as well as this Board, seeking preliminary and permanent injunctions against the Petitioners

requested de-annexation as well as a declaration that this Board lacks authority to grant such de-annexation. See Exhibits 5 and 6 attached.

ARGUMENT

This Motion To Strike Hearing and Abate Further Action is made upon the grounds that:

1. The actions of Petitioners are in violation of Pitt-7's § 1926(b) rights; and therefore a violation of 42 U.S.C. § 1983.

2. That the Board lacks power to deannex such Territory due to Federal preemption; and

3. This Board should defer any mater until resolution is had in the U.S. District Court.

I. THIS BOARD SHOULD STRIKE AND ABATE FURTHER PROCEEDINGS UNTIL RESOLUTION BY THE U.S. DISTRICT COURT

Although this Motion is not a Motion For Preliminary Injunction, the same considerations should be applied.

A preliminary injunction is appropriate to protect a party from irreparable injury and to preserve the Court's power to render a meaningful decision after a trial on the merits. Thus a preliminary injunction is appropriate to prevent irreparable harm to the party seeking the injunction which would otherwise render the judicial process futile. Wright, Miller & Kane, Federal Practice and Procedure, Civil 2d § 2947.

Although the granting of preliminary injunction rests in the discretion of the trial court, and is usually determined upon review of a number of factors unique to each case, the courts have adopted four factors which are most frequently utilized:

1. The magnitude of the threat of irreparable harm to the party if the injunction is not granted.

2. The state of the balance between this harm and the injury granting the injunction would inflict on the other party.

3. The probability of success on the merits, and

4. The public interest.

Wright, Miller & Kane, Federal Practice and Procedure, Civil 2d § 2948. See also SCFC.1LC, Inc. v. Visi USA, Inc., 936 F.2d 1096, 1098 (10th Cir. 1991).

A. PITT-7 WILL SUSTAIN IRREPARABLE INJURY

The most important prerequisite for the issuance of a preliminary injunction is a demonstration that if it is not granted the applicant is likely to suffer irreparable harm before a decision on the merits can be rendered. "Indeed, when the potential economic loss is so great as to threaten the existence of the moving party's business, then a preliminary injunction may be granted, even though the amount of direct financial harm readily is ascertainable". Wright & Miller, § 2948.1

In this particular case Pitt-7 has a loan with FmHA which prohibits the deannexation of any of the Pitt-7 Territory

without first obtaining the approval of the FmHA. If the Territory is deannexed, Pitt-7 will be in default of its obligations under the FmHA loan, which could result in Pitt-7 losing its ability to serve the residents within its Territory as well as the loss of the rights provided by Pitt-7 under Title 7 U.S.C. § 1926(b).

B. BALANCING HARDSHIP TO THE PARTIES

The second factor to be considered in granting a preliminary injunction is an evaluation of the hardship which would be imposed upon the non-moving party as compared with the hardships which would occur to the Movant if the injunction is denied. Wright & Miller, § 2948.2. See: Huites Network System Inc. v. Interdigital Communications Corp., 17 F.3d 691 (C.A. 4th, 1994); Omega Satelite Products v. City of Indianapolis, 694 F.2d 119, 123 (C.A. 7th, 1982).

The hardship placed on Pitt-7 is the resulting default in its FmHA loan, and the loss of its §1926(b) protection. The hardship on the Additional Defendants is non-existent. McAlester will supply continue to sell water to the Additional Defendants until a full resolution of this matter by the Court.

C. PROBABILITY OF SUCCESS ON THE MERITS

The third factor is the probability of success. The burden here seems to be on a "sliding scale" which requires the movant to make less of a showing of probability of success if he has demonstrated he will suffer significant irreparable harm if an injunction is not entered, and requires more of a showing of probability of success if there is only slight evidence that the movant will be injured in the absence of the injunction. Wright & Miller, § 2948.3

"In general, the likelihood of success that need be shown will vary inversely with the degree of injury the Plaintiff will suffer absent an injunction."

Orneiza Satellite Products v. City of Indianapolis, 694 F.2d 119 (7th Cir. 1982), quoting Roth v. Bank of the Commonwealth, 583 F.2d 527 (6th Cir. 1978).

In this case, although the evidence discloses Pitt-7 (and its customers) will suffer tremendous irreparable harm which lessens its burden of showing a likelihood of success, Pitt-7 will likely succeed on the merits.

1. **Deannexation Will Violate Public Policy and Pitt-7's Rights Under 1926(b)**

Pitt-7 has a federal right under Title 7 USC § 1926(b) to be protected from any curtailment or limitation of its rights to sell water within its "Territory". Pitt-7 has brought this action seeking to enforce its right to exclusive water distribution granted it by virtue of Title 7 USC § 1926(b), which provides:

(b) Curtailment or limitation of service prohibited. The service provided or made available through any such association shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the terms of such loan; nor shall the happening of any such event be the basis of requiring such association to secure any franchise, license, or permit as a condition to continuing to serve the area served by the

> association at the time of the occurrence of such event.

The unambiguous wording of this statute and its legislative history disclose that the underlying purpose of § 1926(b) is to protect the territory served by such association against competitive facilities which may be developed with the expansion of municipal boundaries:

> "A new provision [section 1926(b) has been added to assist in protecting the territory served by such an association facility against competitive facilities, which might otherwise be developed with the expansion of the boundaries of municipal and other public bodies into an area served by the rural system.

S.Rep. No. 566, 87th Cong., Ist Sess., reprinted in 1961 U.S. Code Cong. & Admin. News 2243, 2309.

The Courts, which have addressed § 1926(b), have made it clear that the statute should be applied broadly to protect rural water associations indebted to the FmHA from competition from expanding municipal systems, whatever form the competition may take:

> "The clear message of the three federal cases applying 7 USC § 1926(b) and of the Senate Report is that the statute should not be construed narrowly to prohibit municipal encroachment only if technically annexation or grant of a franchise, but should be applied broadly to protect rural water associations indebted to the FmHA from competition from expanding municipal systems.

Jennings Water, Inc. v. City of North Vernon, Inc., 682 F.Supp. 421, 425 (S.D. Ind. 1988), affirmed at 895 F.2d 311 (7th Cir. 1989).

In an Oklahoma Federal District Court case, the Court enjoined a municipal public utility from expanding its sales of water outside the city limits in an area served by a rural water association indebted to the FmHA, although the encroachment was not by expansion of city boundaries or by grant of a private franchise, finding that 1926(b) places federal limits on the power of municipalities to sell water when such sale would result in competition with a rural water district:

> Title 7 U.S.C. § 1926(b) does not negate the power of municipalities to sell water as provided for in the Oklahoma Statutes, nor does it affect the authorization thereof. It does, however, place federally-imposed limitations upon that power, limitations designed to effectuate the legislative scheme of Congress embodied in the Agricultural Act of 1961 (7 U.S.C. § 1921 et seq.). Section 1926(b) prohibits the municipalities' exercise of these powers when their exercise would result in competition with a Rural Water District.

Rural Water District No. 3 v. Owasso Utilities Authority, 530 F.Supp. 818, 824 (N.D. Okl., 1979).

If the competition is based upon a municipality's annexation of an area already within the territory of a rural water district, the application of 1926(b) is even more simple:

> The face of the statute makes clear that Congress protected the indebted rural association from curtailment or limitation by impinging municipal

> corporations. The district court correctly held that District No. 2 came within the purview of section 1926(b) and had met the statute's threshold requirements, having a continuing indebtedness under section 1926 and having "made [service] available" to the area, by virtue of its line adjacent to the property and its responsibilities to applicants within its territory. The statute prohibits Glenpool from using annexation of Eden South to curtail or limit the service made available by District No. 2. Glenpool may not legally use "inclusion" of Eden South it within the boundaries of any municipal corporation" as a springboard for providing water service to the area, and thereby limit the service made available y District No. 2.

Glenpool Utility Services v. Water District No. 2, 861 F.2d 1211, 1214 (10th Cir. 1988).

> "The section (7 USC 1926(b) clearly prohibits any curtailment or limitation of the service provided by a rural water association resulting from the inclusion of all or a party of its territory within a municipality while the association is indebted to the FmHA."

Moore Bayou Water Association, Inc. v. Town of Jonestown, 628 F.Supp. 1367 (N.D. Miss. 1986)

Nor is a municipality allowed to encroach upon the services provided by a Rural Water District by any other means, including condemnation:

> The statute unambiguously prohibits any curtailment or limitation of an FmHA-indebted water association's services resulting from municipal

> annexation or inclusion. This language indicates a congressional mandate that local governments not encroach upon the services provided by such associations, be that encroachment in the form of competing franchises, new or additional permit requirements, or similar means. To read a loophole into this absolute prohibition, as Madison would have us do, and allow a city to do via condemnation what it is forbidden by other means, would render nugatory the clear purpose of § 1926(b).

City of Madison, Miss. v. Bear Creek Water Assn. Inc., 816 F.2d 1057 (5th Cir. 1987).

It is evident from the facts of this case that McAlester seeks to curtail or limit Pitt-7's ability to provide water to the residents within its area by causing promoting and endorsing this deannexation of Pitt-7's Territory. It has been expressly held that § 1926(b) prohibits McAlester (or any other persons or legal entity) from curtailing or limiting the water service of Pitt-7, whether such limitation or curtailment be by annexation, granting of private franchise, requirements of any franchise, license or permit or similar means. As the Bear Creek court held "to read a loophole into the absolute prohibition . . . and allow a city to do via condemnation what is forbidden by other means, would render nugatory the clear purpose of 1926(b)." City of Madison, Miss v. Bear Creek Water Ass'n, Inc., 816 F.2d 1057, 1059 (5th Cir. 1987).

In this case, to allow McAlester, in conjunction with the other Additional Defendants, to do by deannexation of Pitt-7 Territory, that which it is forbidden to do by other means, would also negate the clear purpose of 1926(b). McAlester and the Additional Defendants have merely contrived a new

way to interfere with and curtail Pitt-7's ability to sell water. Such contrivance is a wilful violation of 42 U.S.C. § 1983.

2. The State Statute Allowing Landowners To Deannex Is Preempted By Federal Law

It is clear that a state statute is preempted by a federal statute, if the operation of the state statute would interfere with the accomplishment of the purposes of the federal statute:

> Absent explicit pre-emptive language, we have recognized at least two types of implied preemption: field pre-emption, where the scheme of federal regulation is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," (Fidelity Federal Savings & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 153, 102 S.Ct. 3014, 3022, 73 L.Ed.2d 664 (1982)) . . . and conflict pre-emption, where "compliance with both federal and state regulation is a physical impossibility, "Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (83 S.Ct. 1210, 1217, 10 L.Ed.2d 248) (1963), or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hines v. Davidowitz, 312 U.S. 52, 67(61 S.Ct. 399, 404, 85 L.Ed. 581) (1941). Id. (FN4)

Blue Circle Cement Inc. vs. Board of County Commissioners of the County of Rogers, 27 F.3d 1499 (10th Cir. 1994).

It is evident that to allow the landowners/County Commissioners to deannex certain lands within the Pitt-7 Territory under Title 82 O.S. § 1324.21, when Pitt-7 remains

indebted to FmHA, and is protected by Title 7 U.S.C. § 1926(b), would frustrate and stand as an obstacle to the execution of the full purposes and objections of Congress in the enactment of § 1926(b).

This would be true because the proposed deannexation would eliminate many potential customers from Pitt-7, would lessen the number of potential customers to share in the costs of providing water service, and would indeed have the effect of increasing the price of water service to many within the District's Territory (over what it would be if these potential customers remained) as well as reduction of resources available to Pitt-7 for expansion and improvement to its water delivery system to serve all residents within its Territory.

As stated in North Alamo, the two primary purposes behind § 1926(b) are as follows:

1. to encourage rural water development by expanding the number of potential users of such system, thereby decreasing the per-user cost and

2. to safeguard the viability and financial security of such associations (and FmHA's loans) by protecting them from expansion of nearby cities and towns.

North Alamo Water Supply Corp. v. City of San Jaun, Texas 90 F3d. 910, (5th Cir. 1996).

To allow the landowners and/or the County Commissioners to proceed to deannex the disputed territory, would be to allow them to defeat and frustrate the stated purposes of § 1926(b).

D. PUBLIC INTEREST

The last factor is public interest. The public interest at stake here is to allow the public to have the opportunity to purchase clean safe drinking water and to protect FmHA's ability to get repaid. Thus the public interest will be furthered by enjoining the efforts of McAlester and the Additional Defendants.

CONCLUSION

Based upon the above and foregoing facts, arguments and authorities, the Board should strike the hearing on the Petitions For Deannexation and abate further proceedings on such Petitions until the issues are resolved by the U.S. District Court.

Respectfully submitted,

DOYLE & HARRIS

/s/_____

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OKLAHOMA DISTRICT COURT
IN AND FOR PITTSBURG COUNTY, STATE OF OKLAHOMA

Case No. C 97 825

[Filed July 16, 1997]

PITTSBURG COUNTY RURAL WATER DISTRICT NO. 7, an agency and legally constituted authority of the STATE OF OKLAHOMA, Plaintiff/Appellant	)
vs	)
CITY OF MCALESTER, a municipality, and THE MCALESTER PUBLIC WORKS AUTHORITY, a pubic trust, Defendants/Appellees,	)
KENNETH W. SHERRILL, LINDA F. SHERRILL, CITY OF MCALESTER, BAR-19, BLESSING CORP /d/b/a EDISON PLASTICS, MIG, INC., SOUTHWEST OKLAHOMA BOX COMPANY, TRI-CAT, INC., SIMMONS POULTRY FARMS, INC., DENNIS DEFRANGE, TERRY KINYON, PITTSBURG COUNTY REGIONAL EXPOSITION AUTHORITY, THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF PITTSBURG, H.G. GILLIAM, BILL WEBBER, OBEN WEEKS, AND	)

THUNDERCREEK GOLF COURSE)
TRUST AUTHORITY,)
Additional Defendants/Appellees.)
)

PETITION IN ERROR APPEALING DECISION OF THE BOARD OF COUNTY COMMISSIONERS AND/OR PETITION FOR DECLARATORY JUDGMENT

COMES NOW the Plaintiff/Appellant Pittsburg County Rural Water District No. 7 and hereby alleges and states as follows:

This appeal of the Board of County Commissioners June 23, 1997 Order is brought to this Court pursuant to and in accordance with Title 12 O.S. § 951, as it is a final order made by a board exercising judicial functions and inferior in jurisdiction to the District Court.

In the alternative, Pitt-7 brings this action for a declaration that the Board of County Commissioners actions are void and invalid as a violation of Federal Law.

PETITION IN ERROR

I. TRIAL COURT HISTORY

A. Court/Tribunal:	Board of County Commissioners, Pittsburg, County, State of Oklahoma
B. County:	Pittsburg County, Oklahoma

C. Case No.:	N/A
D. Judge:	Board of County Commissioners
E. Nature of Case:	Various parties petitioned the Board of County Commissioners to deannex lands from Pittsburg County Rural Water District No. 7's Territory.
F. Party Filing Appeal:	Pittsburg County Rural Water District No. 7.
G. Appeal is Brought From:	Final Order of Board of County Commissioners.

II. TIMELINESS OF APPEAL

A. Date judgment, decree or order appeal was filed: The "Orders" were filed on June 27, 1997 and July 7, 1997

B. This Petition is filed by delivering to the Court Clerk within 30 days of entry of the Judgment and Order of the Board of County Commissioners.

III. RELATED OR PRIOR APPEALS

None. However it should be noted that there is currently litigation pending in the U.S. District Court, Eastern District of Oklahoma, in the case styled Pittsburg County Rural Water

District No. 7. v. City of McAlester, et al., Case No. CIV-97-185-B, where all parties are involved and the issue of federal preemption preventing the Board of County Commissioner's actions has been raised.

IV. SETTLEMENT CONFERENCE

Not applicable.

V. RECORD ON APPEAL

No transcript has been ordered because no transcript was made of the prior proceedings.

VI. JUDGMENT, DECREE OR ORDER APPEALED

The Board of County Commissioners Judgment and/or Order entered on June 23, 1997 that the Petition For Deannexation from Pitt-7 filed by the landowners of the Seven W. Taylor Industrial Park and by the Pittsburg County Regional Exposition Authority, were granted.

VII. SUMMARY OF CASE

1. Pittsburg County Rural Water District No. 7 ("Pitt-7"), is an agency and legally constituted authority of the State of Oklahoma [82 O.S. Section 1324.6; Section 1306 (1970) (replead 1972) - predecessor of 1324.6], created for the purpose of developing and providing an adequate water supply to serve and meet the needs of residents within the territory

of the District (Title 82 O.S. Section 1324.3).

2. Defendant City of McAlester (a municipality) and Defendant McAlester Public Works Authority (an Oklahoma public trust created pursuant to 60 O.S. Section 176, et seq.) are located in Pittsburg County, and in part, within the jurisdictional limits of Pitt-7's "Territory". (The Defendants are hereinafter collectively referred to as "McAlester")

3. Pitt-7 is duly empowered as a rural water district, to borrow funds from the Federal Government [Okla. Stat. Tit. 82, Section 1324.10 (Supp. 1988)]. In the process of performing its purpose, Pitt-7 has in fact borrowed funds from the Federal Government, and continues to be indebted to the Federal Government pursuant to and in accordance with Title 7 USC § 1926 for such borrowing.

4. Pitt-7 enjoys the protection of 7 United States Code, Section 1926(b), by reason of its indebtedness due the Federal Government [Congress enacted 7 U.S.C. Section 1926(b), as part of a federal statutory scheme to extend loans and grants to certain associations providing soil conservation practices, water service, or management, etc.]

The statute states:

> The service provided or made available through any such association shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of such loan; nor shall the happening of any such event be the basis of requiring such association to secure any franchise, license, or permit as a condition to continuing to serve the area served by the association at the time of the occurrence of such event.

Title 7 U.S.C. Section 1926(b).

5. 7 U.S.C. Section 1926(b) prohibits municipalities' from exercising their powers to sell water, when their exercise would result in competition with a Rural Water District. (Rural Water District No. 3 v. Owasso Utils. Auth., 530 F.Supp. 818.) The statute [7 U.S.C: Section 1926(b)] protects an indebted rural association from curtailment or limitation "by impinging municipal corporations.

6. Pursuant to its creating statutes, Pitt-7 was established to serve a certain geographical area which is hereinafter referenced as the Pitt-7 Territory.

7. Defendants are and have been selling water within Pitt-7's "Territory" to potential customers of Pitt-7, which Pitt-7 has the ability to provide such service either currently or within a reasonable time.

8. Defendants have been properly warned, in writing, that they impinge, encroach, and are acting in competition with Pitt-7 within the above legally described "Territory". Despite such warnings, the Defendants have, knowingly, continued, in violation of law, to impinge, encroach and act in competition for water service within the "Territory".

9. Pitt-7 has brought an action in the U.S. District Court, Eastern District of Oklahoma, seeking to enforce its right to exclusive water distribution granted it by virtue of Title 7 USC § 1926(b). (See Paragraph 6).

10. The Additional Defendants, Kenneth W. Sherill, Linda F. Sherill, City of Oklahoma Box Company, Tri-Cat, Inc., Simmons Poultry Farms, Inc., Dennis Defrange, Terry Kinyon, the Pittsburg County Regional Exposition Authority, and the Thundercreek Golf Course Trust Authority are either individuals residing within Pittsburg County, State of Oklahoma and/or corporations with their principal place of business located with Pittsburg County, State of Oklahoma, and are hereafter collectively referred to as the "Landowner Defendants."

11. The Additional Defendant the Board of County Commissioners of the County of Pittsburg made up of Additional Defendants H.G. Gilliam, Bill Webber and Oben Weeks is the representative of the County of Pittsburg.

12. McAlester and the Landowner Defendants filed Petitions with the Board of County Commissioners, Pittsburg County, seeking to have the areas disputed in this litigation deannexed from the Pitt-7 Territory.

13. On June 23, 1997 the Board of County Commissioners granted deannexation from Pitt-7 for the Additional Defendants who are landowners with the Steven W. Taylor Industrial Park, as well as for the Pittsburg County Regional Exposition Authority.

VIII. ISSUES TO BE RAISED ON APPEAL

1. Did the Board of County Commissioners act beyond their power and authority in granting the deannexation.

2. Is the State statute which empowers the Board of County Commissioners to grant deannexation preempted by Federal Statute.

3. Did the Board of County Commissioners err in finding that the deannexation is in the best interest of the Water District and the petitioning landowners.

4. Did the Board of County Commissioners apply the appropriate standard in determining to grant deannexation.

IX. NAME OF COUNSEL OR PARTY, IF PRO SE

See the Certificate of Mailing at the end of this Pleading.

PETITION FOR DECLARATORY JUDGMENT

COMES NOW the Plaintiff and for its Petition For Declaratory Judgment alleges and states as follows:

1. Plaintiff incorporates by reference each and every allegation set forth in the Summary of Case above and foregoing.

2. The stated goals of the Federal Statute involved in this dispute [Title 7 U.S.C. § 1926(b)] are as follows:

a. To encourage rural water development by expanding the number of potential users of such system, thereby decreasing the per-user cost, and

b. To safeguard the viability and financial security of such associations (and FmHA's loans) by protecting them from expansion of nearby cities and towns.

North Alamo Water Supply Corp. v. City of San Juan, Texas, 90 F.3d 910 (5th Cir. 1996).

3. Any state statute which operates to frustrate or interfere with the accomplishment of the purposes of a federal statute are pre-empted by the federal statute, i.e. if the state statute operates to frustrate or interfere with the purposes and goals of the Federal statute, the state statute is invalid and not enforceable.

4. To proceed with a deannexation (taking away) of a part of Pitt-7's Territory conflicts with and violates the stated purposes of §1926(b)]. To reduce Pitt-7's Territory, is to reduce (not expand) the number of potential users of the

system, thereby increasing the per-user costs [a direct violation of the first goal of § 1926(b)] as well as reducing the revenues available to Pitt-7, which also violates the second stated purpose of protecting the viability and financial security of the water district.

5. The state statute which grants the Board of County Commissioners the power to deannex a portion of a water district's territory interferes with and frustrates the stated purposes of § 1926(b), and therefore is invalid and cannot be relied upon by the Board to grant the requested deannexation.

6. Even if the Board of County Commissioners had the power to grant the requested deannexation, it exceeded its authority when it deannexed the Territory with no showing that the requested deannexation is in the best interest of Pitt-7.

7. The Oklahoma statute which empowers the Board to deannex lands from a water district provides that such deannexation may occur when the Board makes a "finding that the granting of the petition is in the best interests of the affected landowners and the district." (Title 82 O.S. § 1324.21) Thus, in order to grant the requested deannexation, the deannexation must be in the best interest of both the landowners seeking deannexation as well as the Water District.

8. All of the Petitioners are having their water requirements met. There was no evidence that this would change if the requested deannexation had been denied.

9. The petitioners are concerned that they receive a sufficient water supply to meet their requirements. It should not matter who is providing that service. That being the case, the landowners cannot establish that it is in their best interest

for McAlester to provide the water service as opposed to Pitt-7.

10. The Petitioners did not and cannot demonstrate that the requested deannexation would be in the best interest of Pitt-7. (A fact they must prove in order for the Board to grant the requested deannexation). Title 82 O.S. 1324.21

11. The undisputed evidence presented to the Board discloses that the requested deannexation will deprive Pitt-7 of revenues exceeding $600,000.00 per year. Revenues which would be used by Pitt-7 (a state agency) to improve its water system, to provide services to more residents within its Territory, to reduce the costs of water to its customers, and to make payments on its indebtedness to FmHA and others.

12. It is also undisputed that the deannexation causes Pitt-7 to be in breach of its loan obligations to FmHA. The loan documents to the FmHA pledges as collateral various items, including:

> "All right, title and interest of Borrower in, to and under all rights, grants, privileges . . ."
>
> * * *
>
> "All right, title and interest of Borrower in, to and under all licenses, franchises, ordinances, privileges and permits..."

13. The above quoted language grants FmHA a security interest in all rights and privileges held by Pitt-7, which include the rights and privileges to serve water within its Territory. To deannex a portion of its Territory, is to

eliminate Pitt-7's rights and privileges in relation to the portion deannexed."

14. The Loan Documents further provide that "the property nor any portion thereof or interest therein shall be leased, assigned, sold, transferred or encumbered voluntarily or otherwise without the written consent of the Government".

15. It is thus evident that the requested deannexation (i.e. giving away Pitt-7's rights and privileges in relation to the territory demanded) gives away a part of the collateral held by FmHA and places Pitt-7 in default of its loan agreement.

16. Because the requested deannexation is and was not in the best interest of the District, the Board's decision to deannex the excess in question must be reversed.

PRAYER

The Plaintiff/Appellant prays the Court will enter a judgment as follows:

1. Declaring that the Board of County Commissioner's actions of deannexation are void and of no force and effect, and/or alternatively;

2. Reversing the Board of County Commissioner's decision on deannexation on the grounds that the Board applied an improper statue and/or made a finding not supported by the facts, because the requested deannexation is not in the best interest of the Water District.

Verified by: /s/_____

Steven M. Harris, OBA #3913
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OKLAHOMA DISTRICT COURT
IN AND FOR PITTSBURG COUNTY,
STATE OF OKLAHOMA

Case No. C-97-825

[Filed August 19, 1997]

PITTSBURG COUNTY RURAL WATER DISTRICT NO. 7, an agency and legally constituted authority of the STATE OF OKLAHOMA, Plaintiff/Appellant	)
vs.	)
CITY OF MCALESTER, a municipality, and THE MCALESTER PUBLIC WORKS AUTHORITY, a public trust, Defendants/Appellees,	)
KENNETH W. SHERRILL, LINDA F. SHERRILL, CITY OF MCALESTER, BAR-19, BLESSING CORP /d/b/a EDISON PLASTICS, MIG, INC., SOUTHWEST OKLAHOMA BOX COMPANY, TRI-CAT, INC., SIMMONS POULTRY FARMS, INC., DENNIS DEFRANGE, TERRY KINYON, PITTSBURG COUNTY REGIONAL EXPOSITION AUTHORITY, THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF PITTSBURG, H.G. GILLIAM, BILL WEBBER, OBEN WEEKS, and	)

THUNDERCREEK GOLF COURSE)
TRUST AUTHORITY,)
Additional Defendants/Appellees.)
_____)

PLAINTIFF/APPELLANT'S RESPONSE TO DEFENDANTS' SPECIAL APPEARANCE AND MOTION TO DISMISS

COMES NOW the Plaintiff/Appellant Pittsburg County Rural Water District No. 7. (Pitt-7) and for its response to the Special Appearance and Motion To Dismiss filed herein by the Defendants/Appellees City of McAlester and The McAlester Public Works Authority (hereafter collectively referred as "McAlester") submits the following:

STATEMENT OF FACTS

1. Pittsburg County Rural Water District No. 7 ("Pitt-7"), is an agency and legally constituted authority of the State of Oklahoma [82 O.S. Section 1324.6; Section 1306 (1970) (repealed 1972) - predecessor of 1324.6], created for the purpose of developing and providing an adequate water supply to serve and meet the needs of residents within the territory of the District (Title 82 O.S. Section 1324.3).

2. City of McAlester (a municipality) and McAlester Public Works Authority (an Oklahoma public trust created pursuant to 60 O.S. Section 176, et seq.) are located in Pittsburg County, and in part, within the jurisdictional limits of Pitt-7's "Territory". The City and the Public Works Authority are presently Defendants in Federal Civil Action CIV-97-185-B (Eastern District of Oklahoma). (The two Defendants are hereinafter collectively referred to as "McAlester".)

3. Pitt-7 is duly empowered as a rural water district, to borrow funds from the Federal Government [Okla. Stat. Tit. 82, Section 1324.10 (Supp. 1988)]. In the process of performing its purpose, Pitt-7 has in fact borrowed funds from the Federal Government, and continues to be indebted to the Federal Government pursuant to and in accordance with Title 7 USC § 1926 for such borrowing.

4. Pitt-7 enjoys the protection of 7 United States Code, Section 1926(b), by reason of its indebtedness due the Federal Government. [Congress enacted 7 U.S.C. Section 1926(b) as part of a federal statutory scheme to extend loans and grants to certain associations providing soil conservation practices, water service, or management, etc.]

5. 7 U.S.C. Section 1926(b) prohibits municipalities from exercising their powers to sell water, when their exercise would result in competition with a Rural Water District. (Rural Water District No. 3 v. Owasso Utility Auth., 530 F.Supp. 818.) The statute [7 U.S.C. Section 1926(b)] protects an indebted rural association from curtailment or limitation by impinging municipal corporations.

6. Pursuant to its creating statutes, Pitt-7 was established to serve a certain geographical area which is hereinafter referenced as the "Pitt-7 Territory".

7. McAlester is and has been selling water within Pitt-7's "Territory" to potential customers of Pitt-7, which Pitt-7 has the ability to provide such service either currently or within a reasonable time.

8. McAlester has been properly warned, in writing, that they impinge, encroach and are acting in competition with Pitt-7 within the above legally described "Territory". Despite

such warnings, McAlester has knowingly continued, in violation of law, to impinge, encroach and act in competition for water service within the "Territory".

9. On March 25, 1997, Pitt-7 instigated legal action in the United States District Court, Eastern District of Oklahoma, Case No. CIV-97-185-B, seeking io enjoin and prohibit McAlester from selling water to residents within the Pitt-7 Territory, Exhibit 1

10. On or about May 12, 1997, certain of the residents within the Pitt-7 Territory, (City of McAlester, BAR-19, Blessing Corp d/b/a Edison Plastics, MIG, Inc., Southwest Oklahoma Box Company, Tri-Cat, Inc., Simmons Poultry Forms, Inc., Dennis DeFrange and Terry Kinyon collectively hereafter referred as the "Industrial Park") filed a Petition with the Pittsburg County Clerk (County Commissioners)seeking to have their lands within the Pitt-7 Territory deannexed from such Territory. (Exhibits 2 and 3)

11. Also on May 12, 1997, a Petition For Deannexation was filed by the Pittsburg County Regional Exposition Authority ("Exposition Authority") Exhibit 3

12. On May 15, 1997, a Petition For Deannexation was filed by Kenneth W. Sherrill and Linda F. Sherrill (Exhibit 4), followed by a Petition For Deannexaffon filed by the "Thundercreek Golf Course Trust Authority ("Thundercreek") on May 21, 1997. (Exhibit 5)

13. The parties which filed the above referenced Petitions For Deannextion are hereafter collectively referenced as the "Petitioners".

14. The County Commissioners issued orders which set the Petitioners' Petitions For Deannexation for hearing on June 16, 1997. (Exhibit 6)

15. The County Commissioners, and each of them, as well as the Petitioners were made parties to the litigation styled Pittsburg County Rural Water District No. 7 v. City of McAlester et al., U.S. District Court, E.D. Oklahoma, Case No. CIV-97-185-B, (hereinafter the "Federal Case") by filing the First Amended Complaint on June 2, 1997. (Exhibit 7)

16. In its First Amended Complaint filed in the Federal Case, Pitt-7 sought to enjoin the Commissioners from taking action on the requested deannexation, as well as a declaration that if the Commissioners ordered deannexation, such action is void and of no force or effect as a violation of federal law. (Exhibit 7)

17. The Federal Court set Pitt-7's Motion For Preliminary Injunction (which sought to enjoin the Commissioners and others from proceeding with deannexation) on June 17, 1997. (Exhibits 8 and 9)

18. Although the County Commissioners were requested to strike the scheduled June 16, 1997 meeting to discuss the Petitions For Deannexation pending resolution in the Federal Case, the County Commissioners denied that request and conducted its initial meeting on the Petitions For Deannexation on June 16, 1997. (Exhibit 10 and 11)

19. Christopher J. Wilson entered an appearance as the attorney for the County Commissioners at the initial meeting of the Pittsburgh County Commissioners conducted on June 16, 1997. At the June 16, 1997 hearing, the County Commissioners tabled their decision for one week to see what

would happen at the preliminary injunction hearing scheduled in the Federal Case for the next day. Exhibit 12, St. No. 3

20 At that June 17, 1997 hearing in the Federal Case, Christopher J. Wilson entered an appearance on behalf of the Pittsburg County Board of County Commissioners, and each of them. (Exhibit 12, St. No. 7 and Exhibit 9)

21. On June 23, 1997, at the second meeting of the County Commissioners on the Petitions For Deannexation, Christopher J. Wilson once again appeared as legal counsel for the Commissioners. Also at the time the Commissioners announced that they would grant the Petition For Deannexation filed by the Industrial Park landowners as well as the Exposition Authority.

22. On June 25, 1997, Christopher J. Wilson filed his written Entry of Appearance in the Federal Case on behalf of the Board of County Commissioners, and each of them. (Exhibit 13)

23. The orders granting deannexation were filed on record on June 27, 1997 and July 7, 1997. (Exhibit 14 and 15)

24. On July 14, 1997, a copy of the "Petition In Error Appealing Decision of The Board of County Commissioners And/Or Petition For Declaratory Judgment" was served on Christopher J. Wilson, as legal counsel for the Board of County Commissioners and each of them, by sending a copy of same to Mr. Wilson's last known address, by certified mail return-receipt-requested, postage fully paid thereon. (Exhibit 12, St. No. 9, and Exhibit 16)

25. Also on July 14, 1997, a copy of the "Petition In Error Appealing Decision of the Board of County Commissioners And/Or Petition For Declaratory Judgment" was mailed to the County Clerk of Pittsburg County. (Exhibit 12, St. No. 10 and Exhibit 17)

* * *

III. PLAINTIFF/APPELLANTS DECLARATORY JUDGMENT ACTION SHOULD NOT BE DISMISSED

The declaratory judgment petition was filed herein to address two (2) issues:

1. If the action of the Commissioners in wanting the deannexation is a legislative function, there is no appeal and Pitt-7's relief is though a declaratory judgment action. Garrett v. Watson, 342 P.2d 560 (Okl. 1959); O'Rouke v. City of Tulsa, Oklahoma, 457 P.2d 782 (Okl. 1969).

2. If the action of the Commissioners in granting the deannexations is void, Pitt-7 is free to challenge such action by a separate litigation and is not limited to its appeal rights. Title 12 O.S. § 1038 provides that "A void judgment may be vacated at any time . . ." See also B&C Investment, Inc.v. F&M National Bank & Trust, 903 P.2d 339 (Okl. App. 1993) and Morzette v. Morzette, 882 P.2d 578 (Okl. 1994).

CONCLUSION

Based upon the above and foregoing arguments and authorities, the Defendants' Motion To Dismiss must be denied, and the Court should enter an order directing the County Clerk of Pittsburg County to make a folio of all papers filed in the proceedings of the Board of County Commissioners relating to the Petitions For Deannexation and their decision thereon, and to deliver same to the clerk of the District Court.

DOYLE & HARRIS

/s/ _____

Steven M. Harris, OBA #3913
Michael D. Davis, OBA #11282
2431 E. 61st St., Suite 260
Tulsa, OK 74136
(918) 743-1276

IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

Case No. 90114

[Filed September 26, 1997]

PITTSBURG COUNTY RURAL WATER DISTRICT NO. 7, an agency and legally constituted authority of the STATE OF OKLAHOMA,
Plaintiff/Appellant,

vs.

CITY OF MCALESTER, a municipality, and THE MCALESTER PUBLIC WORKS AUTHORITY, a public trust,
Defendants/Appellees,

KENNETH W. SHERRILL, LINDA F. SHERRILL, CITY OF MCALESTER, BAR-19, BLESSING CORP /d/b/a EDISON PLASTICS, MIG, INC., SOUTHWEST OKLAHOMA BOX COMPANY, TRI-CAT, INC., SIMMONS POULTRY FARMS, INC. DENNIS DEFRANGE, TERRY KINYON, PITTSBURG COUNTY REGIONAL EXPOSITION AUTHORITY, and THUNDERCREEK GOLF COURSE TRUST AUTHORITY,
Additional Defendants,

and

THE BOARD OF COUNTY	)
COMMISSIONERS OF THE COUNTY	)
OF PITTSBURG, H.G. GILLIAM,	)
BILL WEBBER, OBEN WEEKS,	)
Additional Defendants/	)
Appellees.	)
	)

PETITION IN ERROR
(AND PRELIMINARY STATEMENT)

* * *

B. DISPOSITION IN TRIAL COURT OR TRIBUNAL

NATURE OF JUDGMENT OR ORDER APPELLANT SEEKS TO REVERSE:

The Trial Court granted Defendants/Appellees' Motion to Dismiss.

RELIEF SOUGHT BY APPELLANT IN TRIAL COURT OR TRIBUNAL:

Appellant sought to reverse a decision by the Board of County Commissioners of Pittsburg County which deannexed certain lands from the Pitt-7 Territory, and/or a declaration that such orders by the Board of County Commissioners of Pittsburg County were null and void.

RELIEF GRANTED BY TRIAL COURT OR TRIBUNAL:

The Trial Court dismissed the Appeal and Alternative Declaratory Judgment action.

RELIEF SOUGHT BY APPELLEE IN TRIAL COURT OR TRIBUNAL:

Appellees sought to have Appellants' Appeal and Alternative Declaratory Judgment Action dismissed.

* * *

D. ISSUES AND ERRORS PROPOSED TO BE RAISED ON APPEAL

State with specificity each point of law urged as error.

1. Did the District Court commit error in dismissing the appeal filed by Pitt-7?

2. Does the time for appeal set out within Title 19 O.S. § 432, run from the date the decision is orally announced, or from the date a written order is filed?

3. Did Pitt-7 properly serve notice of appeal on the County Commissioners by mailing a copy of the Petition In Error to the County Commissioners' attorney of record pursuant to Title 12 O.S. § 2005?

4. Did Pitt-7 properly serve notice of appeal on the County Commissioners by mailing a copy of the Petition In Error to the County Clerk pursuant to Title 19 O.S. §§ 4 and 5, and Title 12 O.S. § 2005?

5. Does Title 19 O.S. § 431 require a party to post a bond within 20 days of the Board's decision as a condition precedent to the perfection of an appeal?

6. Is a rural water district (as an agency and legally constituted authority of the State of Oklahoma) required to post a bond under Title 19 O.S. § 431 to timely commence an appeal?

7. Did the District Court commit error by determining that under the circumstances of the case, the appeal was not timely commenced?

8. Did the District Court commit error in dismissing the appeal without providing Pitt-7 an opportunity to post the bond as required by Title 19 O.S. § 431?

9. Did the District Court commit error in dismissing Pitt-7's Alternative Declaratory Judgment Action.

10. Is the deannexation by the County Commissioners a judicial or legislative act?

11. Is a decision made by County Commissioners to deannex territory from a rural water district indebted to the Federal Court, null and void as a violation of federal law?

12. Is a determination made by the Board of County Commissioners subject to collateral attack as being void?

I. DATE September 25, 1997 Verified by:

DOYLE & HARRIS

/s/

Steven M. Harris, OBA #3913
Michael D. Davis, OBA #11282
2431 E. 61st St., Suite 260
Tulsa, OK 74136
(918) 743-1276

[Exhibit B]

SUMMARY OF CASE

This is an appeal from the District Court's dismissal of the Petition In Error Appealing Decision of The Board of County Commissioners And/or Petition For Declaratory Judgment, whereby Pitt-7 sought to have certain deannexation orders entered by the Board reversed and/or declared to be void as a violation of Federal Law.

Title 12 O.S. § 951 confers jurisdiction over appeals of decisions by the County Commissioners to the District Court. Title 19.O.S. § 432 provides that such appeal shall be made within twenty (20) days after the decision of said board, by serving a written notice on one of the members of the County Commissioners".

Pitt-7 attempted to commence its appeal by mailing a copy of its Petition In Error to the Commissioners' attorney of record pursuant to Title 12 O.S. § 2005 and by mailing a copy to the County Clerk of Pittsburg County pursuant to Title 12 O.S. § 2005 and Title 19 O.S. §§ 4 and 5. Said mailings occurred within 20 days of the oral announcement of the Board's decision, and was received within 20 days of the written orders filed by the Board.

Pitt-7 did not post an appeal bond set forth within Title 19 O.S. § 431 because as an agency and legally constituted authority of the State of Oklahoma, Pitt-7 is relieved of any obligation to post such a bond. Alternatively, it is Pitt-7's position that the failure to post such a bond is not fatal to its appeal since notice of appeal was properly and timely given. Lastly, any requirement to post an appeal bond is an unconstitutional deprivation of access to the Courts.

The Appellees filed Motions to Dismiss alleging the appeal was not timely because there was allegedly no timely service on the commissioners and because no appeal bond was posted. The Trial Court granted such motion. The Appellees' Motions also sought dismissal of the Alternative Petition For Declaratory Judgment, which the Court also granted.

IN THE COURT OF CIVIL APPEALS,
STATE OF OKLAHOMA
DIVISION 4

Case No. 90,114

Oklahoma District Court,
Pittsburg County Case No. C-97-825

Honorable Thomas M Bartheld, Presiding

[Filed July 9, 1998]

PITTSBURG COUNTY RURAL WATER DISTRICT NO. 7, an agency and legally constituted authority of the STATE OF OKLAHOMA, Plaintiff/Appellant,	)
vs.	)
CITY OF MCALESTER, a municipality, and THE MCALESTER PUBLIC WORKS AUTHORITY, a public trust, Defendants/Appellees,	)
KENNETH W. SHERRILL, LINDA F. SHERRILL, ET AL., Additional Defendants/ Appellees.	)

APPELLANT'S RESPONSE TO APPELLEES'
PETITION FOR REHEARING

This appeal was brought by Pitt-7 due to the District Court's dismissal of Pitt-7's Appeal and alternative Declaratory Judgment Action seeking a determination that the County Commissioners' decision to deannex lands from the Pitt-7 Territory was void. The District Court dismissed Pitt-7's Appeal on the basis that it was allegedly not timely commenced, and dismissed Pitt-7's alternative Declaratory Judgment Action on the finding that the Commissioners' decision was judicial, not legislative. On appeal, this Court has rendered a decision that the District Court acted properly in dismissing the Appeal, not because the appeal was taken untimely, but because the Commissioners' decision was legislative, and not judicial, and further that the District Court improperly dismissed the alternative Declaratory Judgment Action. In reaching its decision this Court did not address the timeliness of the appeal.

The Appellees have now petitioned the Court for a rehearing, arguing that the Declaratory Judgment Action should be dismissed because this Court was in error when it held that the Commissioners' decision was legislative in nature and further requesting this Court address the issue of whether that the Appeal to the District Court was timely commenced.

In response to the Petition For Rehearing, Pitt-7 contends:

1. This Court correctly held that the actions of the Commissioners in deannexing lands from the Pitt-7 Territory was legislative in nature, and

2. Alternatively, if the Commissioners' actions were judicial in nature, the appeal was timely commenced in the District Court.

I. THE DECLARATORY JUDGMENT ACTION SHOULD NOT BE DISMISSED

The declaratory judgment petition was filed herein to address two (2) issues:

A. If the action of the Commissioners in granting the deannexation is a legislative function, there is no appeal and Pitt-7's relief is through a declaratory judgment action. Garrett v. City of Oklahoma City, 590 P.2 1195 (Okl. App. 1979); O'Rouke v. City of Tulsa, Oklahoma, 457 P.2d 782 (Okl. 1969).

B. If the action of the Commissioners in granting the deannexations is void, Pitt-7 is free to challenge such action by a separate litigation and is not limited to its appeal rights. Title 12 O.S. § 1038 provides that "A void judgment may be vacated at any time . . ." See also B&C Investment, Inc. v. F&M National Bank & Trust, 903 P.2d 339 (Okl. App. 1993) and Morzette v. Morzette, 882 P.2d 578 (Okl. 1994).

A. THE DECISION OF WHAT LANDS ARE TO BE INCLUDED IN A RURAL WATER DISTRICT IS LEGISLATIVE IN NATURE

As recognized by the Oklahoma Supreme Court:

> "The legislature may not delegate to the Courts the power to determine the conditions on which certain territory shall be included within, added to, or detached from,

> municipalities and other governmental subdivisions . . ."
>
> * * *
>
> Whether property should or should not be annexed to or detached from the corporate limits of a municipality is purely legislative.
>
> Matter of the De-Annexation of Certain Real Property, 662 P.2d 1375, 1377 (Okl. 1983), quoting with approval 16 C.J.S. Constitutional Law, § 139(2).

Because the water district is a governmental subdivision [an agency and legally constituted authority of the state of Oklahoma, Title 82 O.S. § 1324.6(6)] the determination of what lands shall be included within the water district is a legislative function.

The determination as to whether a particular area should be annexed into or deannexed out of a water district is closely akin to zoning determinations. Zoning is a method by which the use of lands/areas are prescribed i.e. it prescribes the type of building, use or facility that can be placed in a given area. Under Oklahoma law, zoning, rezoning and the refusal to rezone are legislative functions. Garrett v. City of Oklahoma City, 590 P.2d 1195, 1197 (Okl. App. 1978) and Gregory v. Board of County Commissioners of Rogers County, 514 OK P.2d 667, 670 (Okl. 1973) (hereinafter collectively referred to as the "Zoning Cases").

Appellees argue that zoning is distinguishable from the alleged "judicial" exercise of establishing boundary lines. An absurd argument since zoning itself is nothing more than the installment of boundary lines for the purpose of controlling

the use to which certain areas may be put. Indeed, Appellees' argument in this regard is in direct conflict with Matter of Deannexation, supra, a case cited and relied upon Appellees themselves. The real distinction between the zoning cases and the cases relied on by Appellees is that the zoning cases control and restrict the use by the landowners, wherein the cases relied upon by Appellees concern the electorial process of the commissioners, i.e. creation of Commissioners' districts which have no affect on the use of the land by the landowners.

As with the zoning cases, the creation, expansion or deletion of areas from the territory of a water district restrict or direct the use of those areas in the sense that it dictates, to a certain degree, from who those areas will be provided water service.

It must also be noted that each of the decisions relied upon by the Appellees were decided before Gregory, the case which clarified that actions such as zoning, are legislative in nature.

The annexation and deannexation from a rural water district by the County Commissioners is much more akin to the legislative function of a municipality in adding to or deleting areas from its city limits. Matter of De-Annexation of Certain Real Property, 1983 OK 44, 622 P.2d 1375. The statutes which govern the creation and control of water districts (Title 82 O.S. § 1324.1 et. seq.) provides that landowners within the county may petition the Commissioners to create a water district, annex additional territory to the water district or deannex the lands from a water district. Just as landowners have the right to petition a city to annex or deannex their lands into a municipality. The County Commissioners then have to make the determination whether

to create, add to and take away from the district. Just as a city council would in the case of a municipality. Thus, since the County Commissioners are making the decision concerning what lands are included and not included within the water district, much the same as a city counsel would determine what lands are and are not included within the city limits, the act of the County Commissioners in performing this function is legislative.

Lastly, with all due respect to Judge Reif's dissenting opinion, the procedures outlined by the County Commissioners for annexation or deannexation into a water district do not differ from those commonly utilized for zoning issues. As an example, the City of Tulsa regulations relating to zoning changes (Exhibit 1 hereto) require:

- Petition by landowner (1730.1)
- Notice (1730.03)
- Hearing (1730.03)
- Record (1730.04)

Indeed, the Board of County Commissioners cannot be properly considered a "neutral tribunal", since it is the sole decision maker regarding the creation, addition to or deletion from a water district. A decision which is nothing more than a "zoning" for the determination of who will provide water to the residents of the county.

Thus, as recognized by this Court in its Memorandum Opinion:

> Though Garrett and Gregory involve zoning decisions by a board, there is no reason to distinguish them from the deannexation decision at issue here. That decision clearly determines land use and is a legislative function.

B. REGARDLESS OF WHETHER THE ACTIONS OF THE COMMISSIONERS WAS LEGISLATIVE OR JUDICIAL, SUCH ACTIONS ARE VOID AND SUBJECT TO COLLATERAL ATTACK

The power of the County Commissioners to de-annex land from the Territory of Pitt-7 is negated by the preemption of federal law and or is void as a violation of the state statute.

1. The State Statute Allowing Landowners To Deannex Is Preempted By Federal Law

A state statute is preempted by a federal statute, if the operation of the state statute would interfere with the accomplishment of the purposes of the federal statute:

> Absent explicit pre-emptive language, we have recognized at least two types of implied preemption: field pre-emption, where the scheme of federal regulation is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," (Fidelity Federal Savings & Loan Ass'n v. de la Cuesta, 458 U.S. 141,153, 102 S.Ct. 3014, 3022, 73 L.Ed.2d 664 (1982)) . . . and conflict pre-emption, where "compliance with both federal and state regulation is a physical impossibility, "Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (83 S.Ct. 1210, 1217, 10 L.Ed.2d 248) (1963), or where state law "stands as an obstacle to

> the accomplishment and execution of the full purposes and objectives of Congress." Hines v. Davidowitz, 312 U.S. 52, 67 (61 S.Ct. 399, 404, 85 L.Ed. 581) (1941). Id. (FN4) (Emphasis added)

Blue Circle Cement Inc. vs. Board of County Commissioners of the County of Rogers, 27 F.3d 1499 (10th Cir. 1994).

It is evident that to allow the landowners/County Commissioners to deannex certain lands within the Pitt-7 Territory under Title 82 O.S. § 1324.21, when Pitt-7 remains indebted to FmHA, and is protected by Title 7 U.S.C. § 1926(b), would frustrate and stand as an obstacle to the execution of the full purposes and objections of Congress in the enactment of §1926(b).

This would be true because the proposed deannexation would eliminate many potential customers from Pitt-7, would lessen the number of potential customers to share in the costs of providing water service, and would indeed have the effect of increasing the price of water service to many within the District's Territory (over what it would be if these potential customers remained) as well as reduction of resources available to Pitt-7 for expansion and improvement to its water delivery system to serve all residents within its Territory.

As stated in North Alamo, the two primary purposes behind § 1926(b) are as follows:

1. to encourage rural water development by expanding the number of potential users of such system, thereby decreasing the per-user cost and

2. to safeguard the viability and financial security of such associations (and FmHA's loans) by

> protecting them from expansion of nearby cities and towns.

North Alamo Water Supply Corp. v. City of San Jaun, Texas, 90 F3d. 910, (5th Cir. 1996).

It is obvious that to proceed with a deannexation (taking away) of a part of Pitt-7's Territory conflicts with and violates the stated purposes of § 1926(b). To reduce Pitt-7's Territory, is to reduce (not expand) the number of potential users of the system, thereby increasing the per-user costs [a direct violation of the first goal of § 1926(b)] as well as reducing the revenues available to Pitt-7, which also violates the second stated purpose of protecting the viability and financial security of the water district.

The law is clear, when the operation of the state statute violates, frustrates or interferes with the operation of the federal statute, the state statute takes a back seat. The state statute is invalid and unenforceable to the extent it frustrates or interferes with accomplishment of the goals of the federal statute. In this case, the state statute which grants County Commissioners the power to deannex a portion of a water district's territory interferes with and frustrates the stated purposes of § 1926(b), and therefore is invalid and cannot be relied upon by the Commissioners to grant the requested deannexation. Sioux Center states that during the period of indebtedness to the FmHA 1926(b) preempts "any state law that purports to take away from the indebted association any territory in which the association has both a legal and physical ability to provide service at the time the association is first entitled to invoke the protection of 1926(b)." Rural Water System #1, Iowa v. City of Sioux Center, Iowa, 967 F.Supp. 1483 (N.D. Iowa, 1997).

* * *

CONCLUSION

Based upon the above and foregoing arguments and authority, this Court correctly held in its Memorandum Opinion that the actions of the County Commissioners in annexing or deannexing lands from the rural water district is legislative in nature, and thus Appellees' Petition For Rehearing must be denied.

Alternatively, the Appeal to the District Court of the Commissioners' Deannexation Order was timely commenced, and the Court should remand the case back to the District Court for a determination on the merits of that Appeal.

DOYLE & HARRIS

/s/_____

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IN THE COURT OF APPEALS,
STATE OF OKLAHOMA
DIVISION 4

Case No. 90,1114

Oklahoma District Court,
Pittsburg County Case No. C-97-825

Honorable Thomas M. Bartheld, Presiding

[Filed September 25, 1998]

PITTSBURG COUNTY RURAL WATER DISTRICT NO. 7, an agency and legally constituted authority of the STATE OF OKLAHOMA, Plaintiff/Appellant,	)
vs.	)
CITY OF MCALESTER, a municipality, and THE MCALESTER PUBLIC WORKS AUTHORITY, a public trust, Defendants/Appellees,	)
KENNETH W. SHERRILL, LINDA F. SHERRILL, ET AL., Additional Defendants/ Appellees.	)

APPELLANT'S CORRECTED PETITION FOR REHEARING AND BRIEF IN SUPPORT

This appeal was brought by Pitt-7 due to the District Court's dismissal of Pitt-7's Appeal and alternative Declaratory Judgment Action seeking reversal of the County Commissioners' deannexation of lands from the Pitt-7 Territory. The District Court dismissed Pitt-7's Appeal on the basis that it was allegedly not timely commenced, and dismissed Pitt-7's alternative Declaratory Judgment Action on the finding that the Commissioners' decision was judicial, not legislative and that the appeal was the only relief available to Pitt-7. Initially, this Court rendered an opinion that the District Court acted properly in dismissing the Appeal, not because the appeal was taken untimely, but because the Commissioners' decision was legislative and further that the District Court improperly dismissed the alternative Declaratory Judgment Action. Upon Petition For Rehearing this Court reversed its previous decision and has now entered an Opinion On Rehearing declaring that the actions of the County Commissioners were judicial, not subject to collateral attack, and (without discussion) that the appeal was not timely commenced.

Pitt-7 now seeks to have the Court review its decision on the grounds that:

1. The action of the County Commissioners in deannexing lands from a rural water district is legislative in nature;

2. If the County Commissioners' deannexation was judicial, Pitt-7 timely filed its appeal; and

3. Pitt-7's declaratory judgment action on the grounds of lack of jurisdiction is not barred because a void judgment is subject to collateral attack.

STATEMENT OF FACTS

1. Pittsburg County Rural Water District No. 7 ("Pitt-7"); is a rural water district created for the purpose of developing and providing an adequate water supply to serve and meet the needs of residents within the territory of the District (Title 82 O.S. Section 1324.3).

2. City of McAlester and McAlester Public Works Authority are located in Pittsburg County, and in part, within the jurisdictional limits of Pitt-7's "Territory" and are hereinafter collectively referred to as "McAlester."

3. Pitt-7 is duly empowered to borrow funds from the Federal Government [Okla. Stat. Tit. 82, Section 1324.10 (Supp. 1988)] and has in fact borrowed funds from the Federal Government, and continues to be indebted to the Federal Government.

4. 7 U.S.C. Section 1926(b) prohibits municipalities from selling water in competition with a Rural Water District. (Rural Water District No. 3 v. Owasso Utility Auth., 530 F.Supp. 818.)

5. On March 25, 1997, Pitt-7 instigated legal action in the United States District Court, Eastern District of Oklahoma, Case No. CIV-97-185-B (hereinafter the "Federal Case"), seeking to enjoin and prohibit McAlester from selling water to residents within the Pitt-7 Territory. Exhibit 1[1]

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[1] The exhibits referenced herein are the "Exhibits To Plaintiff/Appellant's Response To Defendants' Special Appearance And Motion To Dismiss", filed as part of the Record On Appeal and incorporated hereby by reference.

6. On or about May 12, 1997, certain of the residents within the Pitt-7 Territory, (the "Industrial Park" and the "Exposition Authority") filed Petitions with the Pittsburg County Clerk (County Commissioners) seeking to have their lands deannexed from the Pitt-7 Territory. (Exhibits 2 and 3)

7. The County Commissioners set the Petitions For Deannexation for hearing on June 16, 1997. (Exhibit 6)

8. In its First Amended Complaint filed in the Federal Case, Pitt-7 added the County Commissioners and Petitioners as defendants and sought to enjoin the Commissioners from taking action on the requested deannexation, as well as a declaration that if the Commissioners ordered deannexation, such action is void and of no force or effect as a violation of federal law. (Exhibit 7)

9. The County Commissioners conducted its initial meeting on the Petitions For Deannexation on June 16, 1997. (Exhibit 10 and 11)

10. Christopher J. Wilson entered an appearance as the attorney for the County Commissioners at the initial meeting of the Pittsburgh County Commissioners conducted on June 16, 1997. At the June 16, 1997 hearing, the County Commissioners tabled their decision for one week to see what would happen at the preliminary injunction hearing scheduled in the Federal Case for the next day. Exhibit 12, St. No. 3

11. At the June 17, 1997 hearing in the Federal Case, Christopher J. Wilson entered an appearance on behalf of the Pittsburg County Board of County Commissioners, and each of them. (Exhibit 12, St. No. 7 and Exhibit 9)

12. On June 23, 1997, at the second meeting of the County Commissioners on the Petitions For Deannexation, Christopher J. Wilson once again appeared as legal counsel for the Commissioners. Also at the time the Commissioners announced that they would grant the Petition For Deannexation filed by the Industrial Park as well as the Exposition Authority.

13. On June 25, 1997, Christopher J. Wilson filed his written Entry of Appearance in the Federal Case on behalf of the Board of County Commissioners, and each of them. (Exhibit 13)

14. The orders granting deannexation were filed of record on June 27, 1997 and July 7, 1997. (Exhibit 14 and 15)

15. On July 14, 1997, a copy of the "Petition In Error Appealing Decision of The Board of County Commissioners And/Or Petition For Declaratory Judgment" was served on Christopher J. Wilson, as legal counsel for the Board of County Commissioners and each of them, by sending a copy of same to Mr. Wilson's last known address, by certified mail return-receipt-requested, postage fully paid thereon. (Exhibit 12, St. No. 9, and Exhibit 16)

16. Also on July 14, 1997, a copy of the "Petition In Error Appealing Decision of the Board of County Commissioners And/Or Petition For Declaratory Judgment" was mailed to the County Clerk of Pittsburg County. (Exhibit 12, St. No. 10 and Exhibit 17).

17. The District Court dismissed Pitt-7's Appeal and its alternative Declaratory Judgment action, and this appeal was commenced.

18. In this appeal, this Court rendered its Memorandum Opinion on May 19, 1998 declaring that the District Court was correct in dismissing the appeal, not because it was untimely, but because the Commissioners' decision was legislative. This Court also held that the Declaratory Judgment Action should not have been dismissed and remanded that part of the case.

19. On Petition For Rehearing filed by McAlester, the Court reversed its original Opinion, and held that the deannexation of lands from a rural water district is judicial, and, without discussion, that the Pitt-7 appeal was not timely commenced.

I. THE DECLARATORY JUDGMENT ACTION SHOULD NOT BE DISMISSED BECAUSE THE DECISION OF WHAT LANDS ARE TO BE INCLUDED IN A RURAL WATER DISTRICT IS LEGISLATIVE IN NATURE

If the action of the Commissioners in granting the deannexation is a legislative function, there is no appeal and Pitt-7's relief is through a declaratory judgment action. Garrett v. Watson, 342 P.2d 560 (Okl. 1959); O'Rouke v. City of Tulsa, Oklahoma, 457 P.2d 782 (Okl. 1969).

As recognized by the Oklahoma Supreme Court:

> "The legislature may not delegate to the Courts the power to determine the conditions on which certain territory shall be included within, added to, or detached from, municipalities and other governmental subdivisions . . ."

* * *

> Whether property should or should not be annexed to or detached from the corporate limits of a municipality is purely legislative.
>
> Matter of the De-Annexation of Certain Real Property, 662 P.2d 1375, 1377 (Okl. 1983), quoting with approval 16 C.J.S. Constitutional Law, § 139(2).

Because the water district is a governmental subdivision [an agency and legally constituted authority of the state of Oklahoma, Title 82 O.S. § 1324.6(6)] the determination of what lands shall be included within the water district is a legislative function.

The determination as to whether a particular area should be annexed into or deannexed out of a water district is closely akin to zoning determinations. Zoning is a method by which the use of lands/areas are prescribed i.e. it prescribes the type of building, use or facility that can be placed in a given area. Under Oklahoma law, zoning, rezoning and the refusal to rezone are legislative functions. Garrett v. City of Oklahoma City, 590 P.2d 1195, 1197 (Okl. App. 1978) and Gregory v. Board of County Commissioners of Rogers County, 514 OK P.2d 667, 670 (Okl. 1973) (hereinafter collectively referred to as the "Zoning Cases").

Thus, as recognized by this Court in its Memorandum Opinion:

> Though Garrett and Gregory involve zoning decisions by a board, there is no reason to distinguish them from the deannexation decision at issue here. That decision clearly determines land use and is a legislative function.

* * *

III. THE DECLARATORY JUDGMENT ACTION SHOULD NOT BE DISMISSED BECAUSE THE DEANNEXATION IS SUBJECT TO COLLATERAL ATTACK AS BEING VOID

This argument presents two alternative positions:

1. Pitt-7 is allowed to attack the Commissioners' deannexation as void, and the District Court must address that issue on the merits, or

2. This Court should determine that the Commissioners' deannexation is void, and should enter a judgment accordingly.

A. The District Court Must Address The Issue Of Whether The Commissioners' Deannexation Is Void For Lack Of Jurisdiction

Pitt-7 is free to challenge the deannexation action as being void by a separate litigation and is not limited to its appeal rights. Title 12 O.S. § 1038 provides that "A void judgment may be vacated at any time . . ." See also B&C Investment, Inc. v. F&M National Bank & Trust, 903 P.2d 339 (Okl. App. 1993) and Morzette v. Morzette, 882 P.2d 578 (Okl. 1994).

A void judgment cannot constitute res judicata and may be vacated at any time. Title 12 O.S. § 1038; Bruce v. Miller, 360 P.2d 508 (Okl. 1961)and Lehman v. Tucker, 55 P.2d 62 (Okl. 1936). A judgment by a court without jurisdiction is void and does not operate as res judicata or estoppel. Landy

v. First Nat. Bank & Trust of Tulsa, 386 P.2d 987 (Okl. 1962); Wisel v. Terhune, 204 P.2d 286 (Okl. 1949) and Stevens v. Patten, 50 P.2d 1106 (Okl 1935).

The statute and the case law make it clear that a party has the right to attack a judgment as void in a separate proceeding, until a Court with jurisdiction to hear such attack has made a final determination on that issue. Bruce v. Miller, 360 P.2d 508 (Okl. 1961). In this case the Declaratory Judgment Action brought by Pitt-7 presents the issue to the proper tribunal (i.e. the Oklahoma District Court) to address the question of whether the deannexation was void due to the lack of jurisdiction by the County Commissioners. Such an action is proper and is not barred because no Court with proper jurisdiction has addressed the issue of whether the County Commissioners had jurisdiction to hear the deannexation issues. (The County Commissioners have no authority whatsoever to determine whether the state statute is preempted by federal law).

> "There are three jurisdictional prerequisites to a valid judgment: (1) subject matter jurisdiction, (2) personal jurisdiction, and (3) jurisdiction to render the particular judgment . . . A judgment which was not challenged on appeal may be questioned in a collateral action, but the court's inquiry in the later proceeding cannot extend beyond an examination of the judgment roll to determine whether those jurisdictional elements are present."

Davis v. Sulton Oil. Co., 881 P.2d 763 (Okl. App. 1994) citing Abraham v. Homer, 102 Okl. 12, 226 P.45, 47 (1924); Mayhue v. Mayhue, 706 P.2d 890, 895 (Okl. 1985) and Barton v. Alpine Investments Inc., 596 P.2d 532, 534 (Okl. 1979).

Pitt-7 has the right to attack "collaterally" in the District Court the question of whether the County Commissioners had jurisdiction to decide the deannexation question, i.e. whether § 1926(b) revoked the Commissioners jurisdiction to deannex by operation of Federal Preemption. Regardless of whether Pitt-7 is correct in its argument that the Commissioners lacked jurisdiction, the Trial Court must hear the argument and make a decision on the merits:

> [1] Where a defendant by answer pleads and relies for a defense upon a judgment which, if valid, would be a defense against the plaintiff's cause of action, plaintiff has a right by reply to challenge the validity of that judgment, and the proceedings under which it was obtained, and to plead that it is void. Where he does this, it is the duty of the court to inquire into that judgment and the proceedings by which it was obtained. St. Louis-San Francisco Ry. Co. v. Bayne, 170 Okl. 542, 40 P.2d 1104.
>
> [2] The jurisdiction of any court exercising authority over any subject may be inquired into in every other court when the proceedings of the former are relied on and brought before the latter by a party claiming the benefit of such proceeding. Roberts v. Whiteman, 51 Ok. 731, 152 P. 378; Sharp v. Sharp, 65 Okl. 76, 166 P. 175, L.R.A. 1917F, 562; Souther Pine Lumber Co. v. Ward, 16 Okl. 131, 85 P. 459.

Mayfield v. L.V. French Truck Service, Inc., 369 P.2d 461 (Okl. 1961).

In the alternative Declaratory Judgment Action filed in the District Court, the defendants asserted the defense that the decision by the County Commissioners was final (not timely

appealed) and thus precluded Pitt-7's claims. As stated in Mayfield, when this occurs, Pitt-7 has the right to challenge the validity of that prior decision and "it is the duty of the court to inquire into that judgment and the proceeding by which it was obtained". The Trial Court did not address Pitt-7's argument that the Commissioners acted without jurisdiction due to Federal Preemption, but summarily dismissed Pitt-7's Declaratory Judgment Action on the grounds that such decision could not be attacked collaterally. The Trial Court committed plain error. The void nature of the Commissioners "judgement" must be remanded to the Trial Court for determination.

Therefore, the dismissal of the Declaratory Judgment Action must be reversed and the case remanded to the Trial Court for a determination on the merits concerning whether the Commissioners had jurisdiction to grant deannexation.

B. In The Alternative, The Court Should Find That The Commissioners Lacked Jurisdiction And Enter A Judgment Accordingly

The power of the County Commissioners to de-annex land from the Territory of Pitt-7 is negated by the preemption of federal law which prohibits the City Commissioners from exercising jurisdiction and renders any deannexation void and as a matter of law.

A state statute is preempted by a federal statute, if the operation of the state statute would interfere with the accomplishment of the purposes of the federal statute. Blue Circle Cement Inc. vs. Board of County Commissioners of the County of Rogers, 27 F.3d 1499 (10th Cir. 1994).

As stated in North Alamo, the two primary purposes behind § 1926(b) are as follows:

1. to encourage rural water development by expanding the number of potential users of such system, thereby decreasing the per-user cost and

2. to safeguard the viability and financial security of such associations (and FmHA's loans) by protecting them from expansion of nearby cities and towns.

North Alamo Water Supply Corp. v. City of San Jaun, Texas, 90 F3d. 910, (5th Cir. 1996).

It is obvious that to proceed with a deannexation (taking away) of a part of Pitt-7's Territory conflicts with and violates the stated purposes of § 1926(b). To reduce Pitt-7's Territory, is to reduce (not expand) the number of potential users of the system, thereby increasing the per-user costs [a direct violation of the first goal of § 1926(b)] as well as reducing the revenues available to Pitt-7, which also violates the second stated purpose of protecting the viability and financial security of the water district. Section 1926(b) preempts "any state law that purports to take away from the indebted association any territory in which the association has both a legal and physical ability to provide service at the time the association is first entitled to invoke the protection of 1926(b)." Rural Water System #1 v. City of Sioux Center, 967 F.Supp. 1483, 1529 (N.D. Iowa, 1997).

Because the state statute relied upon by the County Commissioners to grant them the power to deannex lands from the Water District's Territory is preempted by federal law, the actions of the Commissioners are void because they

had no jurisdiction to proceed. "Avoid judgment . . . may be vacated at any time . . .". Title 12 O.S. § 1038, B&C Investment Inc. v. F&M National Bank & Trust, 903 P.2d 339 (Okl. App. 1993) and Morzette v. Morzette, 882 P.2d 578 (Okl. 1994).

CONCLUSION

Based upon the above and foregoing arguments and authorities, the Court should grant Pitt-7's Petition For Rehearing and hold as follows:

1. The deannexation of lands from a rural water district is legislative in nature, reverse the Trial Court's dismissal of Pitt-7's Declaratory Judgment Action, and remand the case for a determination on the merits, or alternatively,

2. If the deannexation of lands from a rural water district is judicial in nature, Pitt-7 timely commenced the appeal of that decision, reverse the Trial Court's dismissal of the appeal, and remand the case back to the Trial Court for a determination on the merits, or alternatively,

3. There has been no adjudication by a Court with proper jurisdiction concerning whether the Commissioners had jurisdiction to proceed with deannexation in light of the Federal preemption issue. Therefore the Court should reverse the Trial Court's dismissal of the Declaratory Judgment Action, and remand the case for a determination on the merits. Alternatively, the Court should declare the deannexation by the Commissioners is void because they lacked jurisdiction due to

Federal Preemption and direct entry of judgment accordingly.

DOYLE & HARRIS

/s/

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IN THE SUPREME COURT
OF THE STATE OF OKLAHOMA

Case No. 90,114

Oklahoma District Court,
Pittsburg County Case No. C-97-825

Honorable Thomas M. Bartheld, Presiding

[Filed October 29, 1998]

PITTSBURG COUNTY RURAL WATER DISTRICT NO. 7, an agency and legally constituted authority of the STATE OF OKLAHOMA, Plaintiff-Appellant,	)
vs.	)
CITY OF MCALESTER, a municipality, and THE MCALESTER PUBLIC WORKS AUTHORITY, a public trust, Defendants/Appellees,	)
KENNETH W. SHERRILL, LINDA F. SHERRILL, ET AL., Additional Defendants/ Appellees.	)

PETITION FOR CERTIORARI

COMES NOW the Appellant Pittsburg County Rural Water District No. 7 and hereby petitions the Court pursuant

to Rule 1.178 et seq. to review an opinion of the Court of Appeals, Division 4. In support hereof, Appellant submits the following:

DATE OF DECISION TO BE REVIEWED

The decision sought to be reviewed was entered September 8, 1998, and the Court of Appeals denied Appellant's Petition For Rehearing on October 13, 1998.

OUTLINE OF REASONS FOR REVIEW

1. The Court of Appeals has erroneously ruled the deannexation of lands from a rural water district is a judicial function, not subject to attack through a declaratory judgment action.

This determination is a question of substance not heretofore determined by this Court, and has been decided in a way probably not in accord with applicable decisions of this Court.

2. If the County Commissioners' decision is judicial, the Court of Appeals wrongfully dismissed the Appeal as untimely, apparently holding that Title 12 O.S. § 2004 controls the service of notice, rather than Title 12 O.S. § 2005, and further that substantial compliance is not sufficient.

This determination is a question of substance not heretofore determined by this Court, has been decided in a way probably not in accord with applicable decisions of this Court and the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings or so far

sanctioned such procedure by a trial court as to call for the Court's power of supervision.

3. The Court of Appeals committed error in dismissing Pitt-7's Declaratory Judgment Action because the decision of the County Commissioners was void, for lack of subject matter jurisdiction due to Federal Preemption.

This determination is a question of substance not heretofore determined by this Court, has been decided in a way probably not in accord with applicable decisions of this Court, and the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings or so far sanctioned such procedure by the Trial Court as to call for the exercise of this Court's power of supervision.

SUPPORT OF REASONS FOR REVIEW

1. Pittsburg County Rural Water District No. 7 ("Pitt-7"), is a rural water district.

2. City of McAlester and McAlester Public Works Authority are hereinafter collectively referred to as "McAlester".

3. On March 25, 1997, Pitt-7 instigated legal action in the United States District Court, Eastern District of Oklahoma, Case No. CIV-97-185-B (hereinafter the "Federal Case"), seeking to enjoin and prohibit McAlester from selling water to residents within the Pitt-7 Territory in violation of 7 USC § 1926(b).

4. On or about May 12, 1997 "Industrial Park" and the "Exposition Authority" filed Petitions with the Pittsburg

County Clerk (County Commissioners) seeking to have their lands deannexed from the Pitt-7 Territory.

5. The County Commissioners, and each of them, as well as the Petitioners were made parties to the Federal Case by filing the First Amended Complaint on June 2, 1997.

6. In its First Amended Complaint filed in the Federal Case, Pitt-7 sought to enjoin the Commissioners from taking action on the requested deannexation, as well as a declaration that if the Commissioners ordered deannexation, such action is void.

7. Christopher J. Wilson entered an appearance as the attorney for the County Commissioners at the initial meeting of the County Commissioners conducted on June 16, 1997. At the June 16, 1997 hearing, the County Commissioners tabled their decision.

8. On June 17, 1997 a preliminary injunction hearing was conducted in the Federal Case, and Christopher J. Wilson entered an appearance on behalf of the Pittsburg County Board of County Commissioners, and each of them.

9. On June 23, 1997, at the second meeting of the County Commissioners on the Petitions For Deannexation, Christopher J. Wilson once again appeared as legal counsel for the Commissioners. Also at the time the Commissioners announced that they would grant the Petitions For Deannexation filed by the Industrial Park and the Exposition Authority.

10. On June 25, 1997, Christopher J. Wilson filed his written Entry of Appearance in the Federal Case on behalf of the Board of County Commissioners, and each of them.

11. The orders granting deannexation were filed of record on June 27, 1997 and July 7, 1997.

12. On July 14, 1997, a copy of the "Petition In Error Appealing Decision of The Board of County Commissioners And/Or Petition For Declaratory Judgment" was served on Christopher J. Wilson, as legal counsel for the Board of County Commissioners and each of them.

13. Also on July 14, 1997, a copy of the "Petition In Error Appealing Decision of the Board of County Commissioners And/Or Petition For Declaratory Judgment" was mailed to the County Clerk of Pittsburg County.

14. The District Court dismissed Pitt-7's Appeal and its alternative Declaratory Judgment action, and this appeal was commenced.

15. The Court of Appeals rendered its Memorandum Opinion on May 19, 1998 declaring that the District Court was correct in dismissing the appeal, not because it was untimely, but because the Commissioners' decision was legislative. The Court of Appeals also held that the Declaratory Judgment Action should not have been dismissed and remanded that part of the case.

16. On Petition For Rehearing filed by McAlester, the Court of Appeals reversed its original Opinion, and held that the deannexation of lands from a rural water district is judicial, and, without discussion, that the Pitt-7 appeal was not timely commenced.

I. CERTIORARI SHOULD BE GRANTED BECAUSE THE-COURT OF APPEALS' FINDINGS THAT THE DEANNEXATION OF LANDS FROM A RURAL WATER DISTRICT IS JUDICIAL IS IN CONFLICT WITH PRIOR DECISIONS OF THE OKLAHOMA SUPREME COURT AND THE OKLAHOMA COURT OF APPEALS

The Court of Appeals has erroneously dismissed Pitt-7's Alternative Declaratory Judgment Action on the grounds that the deannexation of lands from a rural water district is judicial, and not subject to attack by declaratory judgment. The Supreme Court has previously ruled that the power to determine what areas are included within the territory of a governmental subdivision is "purely legislative".

> "The legislature may not delegate to the Courts the power to determine the conditions on which certain territory shall be included within, added to, or detached from, municipalities and other governmental subdivisions . . ."
>
> * * *
>
> Whether property should or should not be annexed to or detached from the corporate limits of a municipality is purely legislative.
>
> Matter of the De-Annexation of Certain Real Property, 662 P.2d 1375, 1377 (Okl. 1983), quoting with approval 16 C.J.S. Constitutional Law, § 139(2).

Because the water district is a governmental subdivision [an agency and legally constituted authority of the state of

Oklahoma, Title 82 O.S. § 324.6(6)] the determination of what lands shall be included within the water district is a legislative function. Therefore, there is no appeal and Pitt-7's relief is through a declaratory judgment action. Garrett v. Watson, 342 P.2d 560 (Okl. 1959); O'Rouke v. City of Tulsa, Oklahoma, 457 P.2d 782 (Okl. 1969).

The finding by the Court of Appeals that the decision as to what lands are to be included within a rural water district is judicial in nature, is inconsistent with the prior rulings of the Oklahoma Supreme Court and the Court of Appeals. Therefore, and the Court should grant certiorari on this issue.

* * *

IV. CERTIORARI SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS DETERMINATION THAT BECAUSE THE DEANNEXATION ORDER WAS JUDICIAL IT WAS NOT SUBJECT TO COLLATERAL ATTACK AS BEING VOID IS IN CONFLICT WITH THE PRIOR DECISIONS OF THIS COURT

The Court of Appeals held that the Commissioners' Deannexation Order was a judicial decree, and as such was not subject to collateral attack as being void. This determination is in conflict with prior decisions of this Court, as well as the Court of Appeals and should be addressed by this Court on certiorari.

A void judgment cannot constitute res judicata and may be vacated at any time. Title 12 O.S. § 1038; Bruce v. Miller, 360 P.2d 508 (Okl. 1961) and Lehman v. Tucker, 55 P.2d 62 (Okl. 1936); See also B&C Investment, Inc. v. F&M National

Bank & Trust, 903 P.2d 339 (Okl. App. 1993) and Morzette v. Morzette, 882 P.2d 578 (Okl. 1994). A judgment by a court without jurisdiction is void and does not operate as res judicata or estoppel. Landy v. First Nat. Bank & Trust of Tulsa, 386 P.2d 987 (Okl. 1962); Wisel v. Terhune, 204 P.2d 286 (Okl. 1949) and Stevens v. Patten, 50 P.2d 1106 (Okl. 1935).

A party has the right to attack a judgment as void in a separate proceeding, until a Court with jurisdiction to hear such attack has made a final determination on that issue. Bruce v. Miller, 360 P.2d 508 (Okl. 1961).

> "There are three jurisdictional prerequisites to a valid judgment: (1) subject matter jurisdiction, (2) personal jurisdiction, and (3) jurisdiction to render the particular judgment . . . A judgment which was not challenged on appeal may be questioned in a collateral action, but the court's inquiry in the later proceeding cannot extend beyond an examination of the judgment roll to determine whether those jurisdictional elements are present."

Davis v. Sulton Oil Co., 881 P.2d 763 (Okl. App. 1994) citing Abraham v. Homer, 102 Okl. 12, 226 P.45, 47 (1924); Mayhue v. Mayhue, 706 P.2d 890, 895 (Okl. 1985) and Barton v. Alpine Investments Inc., 596 P.2d 532, 534 (Okl. 1979).

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>
> [2] The jurisdiction of any court exercising authority over any subject may be inquired into in every other court when the proceedings of the former are relied on and brought before the latter by a party claiming the benefit of such proceeding. Roberts v. Whiteman, 51 Ok. 731, 152 P. 378; Sharp v. Sharp, 65 Okl. 76, 166 P. 175, L.R.A. 1917F, 562; Souther Pine Lumber Co. v Ward, 16 Okl. 131, 85 P. 459.

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Because the Court of Appeals affirmed the Trial Court's dismissal without addressing the jurisdictional issue, such determination is in conflict with the prior decisions of this Court and certiorari should be granted.

* * *

CONCLUSION

Based upon the above and foregoing arguments and authority the Oklahoma Supreme Court should grant certiorari to review the issues presented by this case.

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